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Commission on Trade in Goods and Services,
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Item 3 of the provisional agenda

Major agricultural concerns of developing countries: Impact of the reform process in agriculture on LDCs and net food-importing developing countries and ways to address their concerns in multilateral trade negotiations

Note by the UNCTAD secretariat

I. Background

1. The Expert Meeting on the Impact of the Reform Process in Agriculture on LDCs and Net Food-Importing Countries and Ways to Address their Concerns in Multilateral Trade Negotiations took place from 24 to 26 July 2000 at the Palais des Nations in Geneva. It was held pursuant to paragraph 134 of the Bangkok Plan of Action, adopted by UNCTAD X, and its major objective was to identify, on a country-specific basis, challenges and concerns confronting least developed countries (LDCs) and net food-importing developing countries (NFIDCs) in the face of the reform process in agriculture and to contribute to the formulation of negotiating proposals by LDCs and NFIDCs in the ongoing World Trade Organization (WTO) negotiations on agriculture, so as to ensure that those negotiations would effectively address their concerns.

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2. The discussions led to a recognition that certain problems arising from the agricultural reform process faced by individual LDCs and NFIDCs were in fact common to them. As summarized in paragraphs 27 to 34 of the Report of the Expert Meeting (TD/B/COM.1/31, TD/B/COM.1/EM.11/3), those common concerns included worsening food security problems, structural difficulty in achieving competitiveness in the international agricultural market and heavy dependence on preferential market access for the agricultural exports on which the foreign exchange earnings of many LDCs and NFIDCs depend.

3. The outcome of the Meeting was not intended as the experts' agreed conclusions but rather as a reflection of the richness and diversity of the views expressed, given the versatility and country-specificity regarding agricultural production and trade patterns. It was drawn up as a list summarizing the suggestions of various experts, rather than as one reflecting agreement.

II. Key issues

4. The outcome of the Expert Meeting includes the following key elements:

(a) **Actions under the Ministerial Decision on Measures Concerning the Possible Negative Effects of the Reform Process on Least-developed Countries and Net Food-Importing Developing Countries (Marrakesh Decision)** should be aimed at making that decision more operational and more focused on long-term food security problems than on short-term food aid needs. The possible effects on LDCs and NFIDCs of the new, more stringent multilateral discipline on export subsidies and export credits warrant special consideration. Food aid should be properly targeted in order to avoid disruption of domestic production. Technical and financial assistance to the agricultural sector should be upgraded, and the possibilities of setting up a revolving fund and negotiating separate conventions for that purpose are to be explored.

(b) **Negotiations on the continuation of the reform process in agriculture** should be aimed at eliminating tariff peaks and tariff escalation, and reducing tariff barriers in developed countries for agricultural exports produced by LDCs and NFIDCs. Other preferential tariff- and non-tariff-related market access measures for those countries should also be envisaged. Negotiations on export competition policies should focus on eliminating export subsidies provided by developed countries, while allowing LDCs and NFIDCs flexibility in implementing such promotion measures, and on improving the multilateral discipline on export credits. Negotiations on domestic support measures should aim at substantially reducing their use in developed countries, and at increasing flexibility in their application in developing countries and in LDCs and NFIDCs in particular. Negotiations should also aim at allowing LDCs and NFIDCs special and differential treatment in applying safeguard measures to protect small farmers and key staples. Non-trade concerns such as rural development, poverty alleviation and the food security of developing countries should also be the focus of future negotiations.

(c) **Other issues** relate to the consistency and fairness of the global framework of multilateral rules on agricultural trade. Developing countries should be given credi

for the liberalization measures undertaken autonomously in the past and should not be asked to go beyond their WTO commitments as a condition for the implementation of programmes financed by the Bretton Woods institutions. Negotiations on accession to the WTO should take into account the specific conditions prevailing in the agricultural sectors of acceding countries.

5. The members of the Commission might wish to continue deliberations on these and other key issues of common interest with the aim of better understanding each other's positions and advancing the process of consensus building. Also, there may be a need to examine in greater detail the technical aspects of the suggestions made above, in particular the special situation of certain developing countries and the ways and means of protecting the interests of small firms and addressing the problem of rural poverty.

III. Policy options

6. The outcome of the Expert Meeting also contains recommendations to UNCTAD (and other international organizations) with regard to those areas where follow-up activities would be needed:

(a) Technical assistance from UNCTAD and other international organizations is required in analysing information on the agricultural trade policies of other countries and to support developing countries, particularly LDCs and NFIDCs, in the current negotiations and in negotiations on accession.

(b) UNCTAD should play a key role in providing the statistical and analytical background needed to support developing countries in the negotiations. Specifically, UNCTAD, working with the Food and Agriculture Organization of the United Nations (FAO) and other international organizations, should: (i) document and quantify in as much detail as possible the domestic and export support measures and market access restrictions applied by developed countries to their agriculture at the sector and commodity levels, per country, and (ii) assess the impact of support measures and market access restrictions on the competitiveness of developing country exports and domestic products at the commodity and country levels.

(c) UNCTAD should analyse the impact of the Agreement on Agriculture on LDCs, NFIDCs and small island developing countries in agricultural trade, and should develop a specific action plan and accompanying budget.

(d) UNCTAD should analyse ways to reduce the cost disadvantages in agricultural trade (due particularly to transport costs) faced by the landlocked countries.

7. The Commission may wish to endorse these recommendations, amend them if necessary, and discuss how they should be reflected in its plan of action in the coming year(s).

8. In addition, on the basis of the discussions at the Expert Meeting as well as of the other activities of the Division on Trade in Goods and Services, and Commodities in the area of agriculture, the following issues may be considered as issues that are crucial to major agricultural concerns of developing countries:

- The process of adjustment from heavy dependence on preferential trading arrangements to sustainable product diversification in the face of multilateral trade liberalization;
- Factors determining the competitiveness of agricultural (primary and processed) exports of developing countries, considering the recent development of agricultural market structure, consumer preferences and concerns (including concerns about food safety) and food technology;
- Structural disadvantages of least developed and small developing economies in gaining a competitive edge in the international agricultural market.

IV. Comments received

9. The following comments have been received from one UNCTAD member State (Saudi Arabia) and from the European Union:

Saudi Arabia (received on 15 November 2000; original in Arabic)

1. Measures related to the negative implications of the agricultural reform programme for the net food-importing developing countries:

> It is imperative that the Marrakesh Decision be applied for the benefit of the developing countries and the least developed among them, so as to solve in the long run the problems that these encounter in the field of food security.

2. With regard to negotiations in the are of agriculture, the following procedures should be followed:

- Opening the markets for agricultural products of importance to developing countries through maximum tariff reductions and the elimination of tariff escalation measures;
- Eliminating export subsidies offered by developed countries, and disciplining export credits;
- Minimizing the extensive use of Green Box measures by developed countries, and eliminating Blue Box measures;
- Increasing the minimum level of agricultural support for the developing countries, which currently stands at 10 per cent, in order to diversify agricultural products, mitigate rural poverty and strengthen the export competitiveness of local products.

3. Accession to the WTO:

- The situation of the agricultural sector in the developing countries should be taken into account when negotiating accession.

European Union (received on 21 November 2000; submitted by the Permanent Mission of France)

Three additional points should be added to Chapter I of the Report of the Expert Meeting ("Outcome of the Expert Meeting") so that it reflects all the opinions expressed at the Meeting:

1. Under "Market access"

- A large majority of developing countries would benefit most in future if preferential treatment in developed country markets is continued and improved.

2. Under "Export competition policies"

- Given that there are various ways of supporting exports, disciplines on export subsidies should be accompanied by disciplines on other measures of export support such as export credits, and on abuse of food aid and state trading export operations.

3. Under "Domestic support"

- Blue Box support helps the reform process in agriculture and has a low trade-distorting impact.

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Major agricultural concerns of developing countries: Impact of the reform process in agriculture on LDCs and net food-importing countries and ways to address their concerns in multilateral trade negotiations

Note by the UNCTAD secretariat

Addendum

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IV. Comments received

Morocco (received on 19 December 2000, original in French)

1. The outcome, with respect to different subjects under the ongoing negotiations on the agricultural reform, is formulated in a very general manner.

2. The ways to put into practice the recommendations listed in the outcome are not given enough attention, as the ways to make the recommendations effective are not mentioned.

3. The feasibility of the outcome depends on its conformity with the Agreement on Agriculture and increased, enhanced or new concessions that developed countries are ready to provide to least developed countries and net food-importing developing countries. However, having recourse to export subsidies and domestic support measures, especially direct payment under the production limitation programme (Blue Box), principally benefits those developed countries which do not agree to eliminate them.

4. Certain recommendations in the outcome do not take into account the necessary conditions for implementation that are stipulated in the Agreement on Agriculture. For instance the request for special safeguard measures by all developing countries would, in effect, benefit only those countries which had reserved the right to claim them for tariffied products.

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Analysis of ways to enhance the contribution of specific services sectors to the development perspectives of developing countries: National experiences with regulations and liberalization: Examples in the construction services sector and its contribution to the development of developing countries

Note by the UNCTAD secretariat

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I. Background

1. *The mandate.* The Expert Meeting on National Experiences with Regulation and Liberalization: Examples in the Construction Services Sector and Its Contribution to the Development of Developing Countries was convened upon the decision of member States taken at the consultations of the President of the Trade and Development Board on 31 March 2000 in accordance with paragraph 134 of UNCTAD X's Plan of Action as contained in document TD/386, which states that: "UNCTAD should help developing countries in identifying: the priority sectors where early trade liberalization should take place; the main trade barriers that developing countries face in those service sectors, especially those which limit developing country ability to export their services; the preconditions, at the domestic level, which are necessary for developing countries to benefit from trade liberalization in the service sector in general. Attention should be paid to the opportunities offered to developing countries by opening the economic environment. This analysis should be supported, where necessary, by technical assistance to strengthen their domestic service capacity, and in particular thorough support in the area of policy and legislative adjustments." The decision was confirmed by the Trade and Development Board at its twenty-fourth executive session on 12 May 2000. The Expert Meeting was held at the Palais des Nations, Geneva, from 23 to 25 October 2000.

2. *The main issues arising from the experts' discussions.* The experts from national capital demonstrated an exceptional degree of enthusiasm, indicating that they had never had such an opportunity to express their views and concerns in an international forum. The discussions took place at two levels, involving on the one hand General Agreement on Trade in Services (GATS) negotiators and on the other hand experts from national capitals. The discussions among the GATS negotiators showed the difference of views with respect to the *negotiating approach* in the construction services sector, where some favoured the use of the so-called cluster approach while others opposed it. The discussions among the experts from capitals demonstrated no opposing views, but differences in emphasis. The main issue of concern to them was *to obtain a greater share of their domestic market* for construction, particularly for projects financed by the World Bank and other donors. This concern was closely related to having a greater *access to technology and financing*. The *participation of private business associations* could play a multiplier role in developing countries by raising awareness about the World Trade Organization (WTO) processes and inviting a higher level of involvement of different constituencies in formulating national policies and positions in the trade negotiations.

3. The main issues raised, including future work at the international level, are discussed below. There are a number of key issues and policy options arising from the Expert Meeting for consideration by the Commission.

II. Areas for further action: Policy proposals based on the Expert discussions

(a) Policy environment favourable to development of the construction services sector at the national level

4. Experts from developing countries emphasized that their primary concern was how to improve the competitiveness of their own firms so that they could compete successfully in the multilaterally and bilaterally financed construction projects in their countries. Much of the

debate focused on the need for better policies for capacity-building. In this respect:

(a) A national policy framework should be created to promote utilization and building of domestic capacities.

(b) The necessary elements of a policy mix would address optimal instruments of industrial policy, human resource development and macroeconomic policies, including fiscal policies which avoid onerous internal taxation of construction firms and high tariffs on essential equipment.

(c) Removing unnecessary bureaucratic obstacles internally may bring benefits already in the short run.

(d) In the longer term, however, success in building competitiveness will depend on adequate funding for research and development.

(e) The right policy mix can be achieved only if dialogue is maintained between all stakeholders in the private and public sectors of the economy.

5. Experts stressed that local companies need to follow a "learn by doing" approach. Once they have accumulated expertise and strengthened their competitiveness, these may be translated into export capacity. *The best policies and legislation* aimed at upgrading the capacity of the construction services sector should include provisions to encourage the transfer of technology to domestic firms through joint ventures and other forms of partnership with foreign firms.

6. The building of construction services' export capacity may be strengthened if transparency is maintained in the export markets of *developed countries* and effective recourse against anti-competitive practices is ensured.

7. Experts noted that developing countries will succeed in boosting the performance of their construction services firms to the extent they make progress in human resource development. This development should be targeted at:

(a) The training of highly skilled professionals, as well as other workers, in order to fulfil the requirements of the sector;

(b) Developing skills related to the use of information technology;

(c) Developing project management and design skills and capacities, which can provide a lead into foreign markets.

8. Experts indicated that the driving force in the implementation of these objectives and in capacity building is national Governments, supported by UNCTAD and other related international and regional institutions and organizations.

(b) Issues for the positive agenda of developing countries in multilateral trade negotiations

9. Experts stressed that the framework for developing countries to acquire knowledge and transfer of technology as a way of developing domestic capacities in the construction services sector should be established in line with the provision of GATS Article IV. In this light:

(a) Negotiations on the GATS rules in the area of government procurement should address the specific aspect of multilateral funding and tied aid in the provision of construction services as the means of implementing GATS Article IV.

(b) A difference of views emerged with respect to the use of the cluster approach which could be included as an Annex on Construction Services aimed at addressing the specific problems that developing countries face in the construction services sector and at ensuring the application of GATS Article IV.

(c) Additional commitments by the leading exporters of construction services may be considered with respect to the implementation of GATS Article IV provisions in the construction services sector. These could include commitments with respect to restrictions on the temporary movement of personnel, discriminatory and non-transparent licensing and standards and anti-competitive practices, non-recognition of professional qualifications, problems of access to networks for the supply of construction services, discriminatory government procurement practices against developing countries' construction services providers, subsidies, tied aid and discriminatory tax policies.

10. The experts emphasized that any commitment or rules that developing countries accept should permit the *policy flexibility* needed to maintain local content requirement related to services, as well as requirements of associations and joint ventures, so as to include local companies in the design and implementation of construction projects.

11. The experts suggested that the multilaterally agreed criteria for the *practice of architects* could be based on the minimum requirement for the qualification of architects and engineers adopted by the International Union of Architects. This may serve to promote work in the WTO in the area of mutual recognition of qualifications and to facilitate the recognition of diplomas and curricula.

12. There was a consensus among the experts that preferential treatment within the framework of *subregional agreements* among developing countries could provide opportunities for developing country construction services firms, including through harmonized legislation. Therefore, trade among developing countries should be promoted in the construction services sector, including trade in related equipment and materials and the movement of qualified personnel.

13. Experts indicated that progressive liberalization should start in those areas of construction services that may contribute to achieving social objectives, for example the construction of housing.

(c) Collaboration of UNCTAD with the multilateral financial institutions

14. Experts suggested that UNCTAD should work to ensure that multilateral financial institutions and donor countries support domestic policies aimed at developing national capacities in construction services. This could be achieved:

(a) Directly through targeted programmes, e.g. on capacity-building;

(b) Indirectly through implementation of multilateral development assistance which has construction projects as a component, e.g. in the building of infrastructure.

15. Experts indicated that *margin of preference* in international tendering allocated to local firms should be sufficient to allow their effective participation, and that criteria established for participation in multilaterally financed projects should not be so stringent as to exclude domestic construction firms in developing countries. Otherwise, this might detract from the limited domestic opportunities available to developing country firms to build their capacities.

16. Experts also highlighted the need for multilateral financial institutions to ensure the *harmonization of rules for procurement* in order to enhance transparency and fairness in bidding procedures.

(d) Possible future activities for UNCTAD

17. Experts noted that no other international organization has so far addressed the issue of trade in construction services in a comprehensive manner with emphasis on the development dimension. In this respect, UNCTAD should take the lead in promoting and establishing *linkages among all the stakeholders* in the international market for construction services. This required a continuing dialogue between the relevant professional associations, multilateral financial institutions and bilateral and regional funding agencies and development agencies from developed countries. The dialogue should focus on how to address development and trade issues in tandem so as to ensure greater participation by developing country firms in their domestic and international markets.

18. To meet the needs identified by experts and in order to *build awareness about construction services related trade issues* among the broader audience in developing countries, UNCTAD should use its existing technical assistance projects, for example the Commercial Diplomacy Programme.

19. Work sought by experts from UNCTAD in the area of legislative adjustments in the construction services sector is important both for supporting the development and efficient functioning of the domestic construction services sector and for achieving progress in multilateral trade negotiations. To address the first objective, a *model law* to promote the development of an efficient and competitive construction services sector might be needed. UNCTAD should work with the United Nations Commission on International Trade Law (UNCITRAL) to assess the feasibility of drafting such a law. With regard to the other objective, UNCTAD should continue its work on the Measures Affecting Service Trade (MAST) information database and aim to include therein legislation and regulations affecting trade in construction services.

20. Experts felt that there was a need to organize a *follow-up ad hoc meeting* to further discussions in the area of construction services. In collaboration with other international and regional organizations and with bodies in the field of construction services such a meeting could aim at preparing a "deliverable" to the international community as to how to implement the issues outlined above, including within the framework of the current GATS negotiations.

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Comments by the Mission of Mauritius to the United Nations on the outcome of the UNCTAD Expert Meeting on National Experiences with Regulation and Liberalization: Examples in the Construction Services Sector and Its Contribution to the Development of Developing Countries

GE. 01-50426

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Please refer to UNCTAD Notification No. TDO 912(1) 00/109, dated 10 November 2000.

The Mission of gives hereunder comments which it has received from capital its:

(a) A strong domestic construction services sector can be a powerful instrument for employment creation, a crucial infrastructure service and a means of upgrading the welfare of people in developing countries. Dialogue should be maintained consistently between private and public stakeholders to achieve the right policy mix.

(b) Consideration may be given to:

(i) Commissioning of case studies of successful joint ventures with foreign firms to serve as a basis for preparation of policy guidelines, with a focus on economic, fiscal and industrial policies and a regulatory framework;

(ii) Capacity-building in developing countries so as to enable them to participate more effectively in negotiations on trade in services;

(iii) Emphasis on the social objectives of the sub-sectors, e.g. housing.

(c) The policy of continuous learning and training of professionals should be reinforced.

It would be appreciated if these comments could be factored into UNCTAD's work during the Commission's session to be held in February 2001. We would appreciate receiving three copies of the report on the session and related documents when they become available.

The delay in submitting the above comments is regretted.

Assuring you of my best personal regards.

Yours sincerely,

S. Palayathan
For Head of Mission

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THE SUSTAINABLE USE OF BIOLOGICAL RESOURCES: SYSTEMS AND NATIONAL EXPERIENCES FOR THE PROTECTION OF TRADITIONAL KNOWLEDGE, INNOVATIONS AND PRACTICES

Note by the UNCTAD secretariat

I. Introduction

1. The protection of knowledge, innovations and practices of indigenous and local communities (hereafter referred to as "traditional knowledge", TK) has been receiving increasing attention on the international agenda in recent years. This is due to several factors. First, it has been recognized that TK plays a key role in the preservation and sustainable use of biodiversity. Second, many activities and products based on TK are important sources of income, food, and healthcare for large parts of the populations in many developing countries, including the least developed countries (LDCs). However, TK is being rapidly lost as local ecosystems are degraded and traditional communities are integrated into the wider society. Third, concerns have been raised about how the benefits derived from the use of biodiversity and associated TK are appropriated and shared. Fourth, while the need to protect TK and to secure fair and equitable sharing derived from the use of biodiversity and associated TK has been fully recognized, for example in the Convention on Biological Diversity, there is no agreement on what would be the most appropriate and effective ways to achieve these objectives. Fifth, the long term sustainable economic development of many indigenous and local communities may depend on their ability to harness their TK for commercial benefit, which in turn requires its protection.

2. In the Plan of Action adopted at UNCTAD's tenth Conference in February 2000, member States decided to address the protection of TK as part of UNCTAD's work in the area of trade and environment by "taking into account the objectives and provisions of the Convention on Biological

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Diversity and the TRIPS Agreement, studying ways to protect traditional knowledge, innovations and practices of local and indigenous communities".

3. In response to this mandate, the Expert Meeting on Systems and National Experiences for Protecting Traditional Knowledge, Innovations and Practices was held in Geneva from 30 October to 1 November 2000. The Expert Meeting was prepared in close co-operation with the secretariats of other intergovernmental organizations, in particular of the Convention on Biological Diversity (CBD) and the World Intellectual Property Organization (WIPO). Issues for discussion were outlined in the background note prepared by the secretariat (TD/B/COM.1/EM.13/2). Over 250 experts from some 80 countries attended this meeting. Participants included policymakers, representatives of indigenous communities, non-governmental organizations, academics, the business community, and international organizations. A wealth of information was presented at the meeting, including over 50 papers submitted by experts. The experts adopted an outcome reflecting the diversity of views expressed and summarizing their conclusions and recommendations (TD/B/COM.1/EM.13/L.1). At the request of a WTO member, the outcome was distributed at the Committee on Trade and Environment and the TRIPS Council.

4. The Commission's task is to turn that outcome into agreed conclusions and recommendations for policy action at the national and international level, including for UNCTAD. This document attempts to facilitate that task by highlighting important areas for policy action that emerged from the Expert Meeting's discussions and outcome. In addition, the secretariat issued a communication, dated 20 November 2000, inviting comments on the outcome of the meeting, in particular in the following areas:

- Elements of the outcome that would require follow-up actions by the Commission;
- General proposals on activities to implement the experts' recommendations;
- Identifying areas for designing or strengthening technical cooperation programmes to address specific capacity-building needs arising from the outcome;
- Highlighting areas of co-operation with other intergovernmental organizations concerning the protection of traditional knowledge.

5. The UNCTAD secretariat has received ample oral feedback on the outcome of the Expert Meeting, welcoming in particular the richness of the debate of experts and the recommendations on capacity-building assistance by international organizations with a stronger regional focus. However, at the time of drafting this document, formal comments had been received in response to the above-mentioned communication.

II. Possible policy action at the national level

6. TK plays a valuable role in several sectors, including traditional medicine, traditional agriculture and handicrafts. However, it is often undervalued and underutilized, and is currently being lost. Consequently, the Experts called for "raising awareness of the role and value of TK among local and indigenous communities (LICs), policy makers and other stakeholders" (paragraph 33 of TD/B/COM.1/EM.13/L.1)[1]. Governments, international organizations and other stakeholders can be actively involved in awareness raising activities. These could include training programmes, consultative meetings, publications, and media campaigns.

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[1] All quotes in the remainder of the text refer to the same document.

7. In developing policies and programmes aimed at protecting TK, the experts stressed the importance of fully involving LICs, particularly the women in those communities, who are primary custodians and transmitters of TK to future generations.

8. The protection and preservation of traditional knowledge is inextricably linked to the preservation of the local and indigenous communities that are the holders of TK as well as to the conservation of the natural habitats of these communities. Thus, policy makers should be aware that any action that enhances the cultural identity and survival of LICs, also contributes to preserving TK and biodiversity. Governments might wish to take stock of policies affecting LICs and biodiversity in this light.

9. TK is not static, but rather constantly evolving in response to changing conditions. Experts held that "TK communities need to ensure that their innovations systems need to be supported and rewarded and that they are not locked out of the research agenda by major companies and countries". There is a need for more research in TK and benefits can be gained from cross-fertilization between TK and other types of knowledge systems. In particular, experts believed that "possibilities of interaction between traditional and modern medicine should be carefully studied, and there is a need for more research on the effective use of traditional medicine, in particular with universities, polyclinics and hospitals." Governments could play an important role in promoting and financing such research and disseminating the findings both nationally and internationally.

Systems for the protection of TK

10. Within LICs, access to and use of TK is governed by diverse systems of customary laws. However, these are usually non-binding beyond the community. Many experts suggested a pluralistic legal approach to the protection of TK, combining increased recognition of customary law with other suitable instruments in national legislation. An exchange of experiences among countries where progress has been made in this area could be useful. The Commission might wish to recommend that Governments examine how customary laws of LICs in their countries could be strengthened.

11. Experts expressed divergent views about the extent to which the current intellectual property rights (IPR) regime could protect TK. Some thought IPRs could be used in certain cases. Others held that the current IPR regime is inappropriate for the protection of TK systems because of the inherent conflict between the two systems. Moreover, concern was expressed that most traditional communities did not have the resources to file patents and other IPR applications or to take legal action to prevent improper granting of patents (e.g. an invention that is not new being awarded a patent due to inadequate information). Experts also expressed the view that "[T]here is a need to explore an international framework for collective rights within the universe of IPRs, possibly including in WIPO, WTO and CBD" (paragraph 19 of the outcome).

12. Several governments made proposals on linking IPRs and TK, for instance through certificates of origin or disclosure clauses in patent applications or, as in the Andean Decision 406, by linking the approval of TK-based patents to the presentation of a contract for licensing, as outlined in paragraph 17 of the outcome.

13. At the Expert Meeting, TK holders and others expressed the view that "patenting of life forms should be banned because it attacks the values and the livelihoods of LICs".

14. A good number of experts pointed out that current IPR regimes could not adequately protect all types of TK. It was therefore recommended that "apart from using suitable modern IPR instruments for appropriate cases, a national *sui generis* system for the protection of TK may be useful." The term *sui generis* means "one of a kind" or "of its own kind" and in this case could encompass a constellation of policies, procedures and programmes specifically designed to protect TK. Experts recommended that "such a *sui generis* system could include the following common elements: collectively held TK-rights; registers of knowledge; clear systems of access to such rights and benefit-sharing; clarification of land resource rights as part of the holding of TK rights; wide participation and consultation; and creation of effective incentives for research" (paragraph 34 of the outcome). Codes of conduct can also be incorporated.

15. There are several model *sui generis* systems which could be useful starting points, including that of the Organization of African Unity. Also, some countries have drafted *sui generis* legislation, notably Peru and Panama. The Commission might wish to recommend that interested governments take a proactive approach to developing national *sui generis* legislation in their countries, learning from the experiences of other developing countries.

16. Access and benefit sharing (ABS) legislation and regulations are an integral part of national systems to protect TK. Prior Informed Consent (PIC) is one of the pillars of ABS. Currently, over 50 countries are drafting ABS legislation, primarily to govern access to their genetic resources. Only some of them extend the principle of PIC to the community level. The Commission might wish to recommend that access to genetic resources on the territory of LICs and associated TK be obtained with the PIC of the TK-holding community and in compliance with the community's customary laws to ensure appropriate involvement in decision making and benefit sharing. In the case where several communities hold the same knowledge, the government could consider setting up a community knowledge fund with low overheads to collect and distribute benefits.

17. Registries of TK can also be important, whether or not as an element of *sui generis* systems. These can help preserve TK. They can also help prevent improper granting of patents by proving prior art. However, consideration needs to be given to the forms of accessibility to registries, since making TK more readily available could facilitate its use without proper acknowledgement or compensation. Experts emphasized that governments could play an important role in coordinating and promoting grassroots efforts to document TK and could, for example, encourage a common format and help disseminate the information to patent offices worldwide to facilitate the screening of prior art in TK-based patent applications.

18. Experts emphasized that national policy coordination was important for TK protection and development. Without such coordination, policies and programmes originating in different government departments could have conflicting impacts and even work in opposite directions. This could be particularly true with complex issues such as TK protection. Therefore, the experts recommended that, in addition to developing a *sui generis* system as described above, "TK protection needs to be reflected in other national policy areas, such as agriculture, forestry, investment and finance." For example, governments might wish to be sure that their forestry policies allow the indigenous groups living in the forests to maintain their traditional lifestyle. "Agricultural extension services and the direction of R&D in developing countries should take account of TK" (paragraph 13 of the outcome). Governments might wish to set up multi-stakeholder processes to examine and coordinate action on this issue.

Harnessing TK for development and trade

19. Experts provided numerous examples on the contribution of TK to the development process. This concerned, *inter alia*, enhanced agricultural production; increasing value of education systems; improving the quality of health care and contribution to good governance (e.g. local institutions often play a vital role in improving post-conflict situations). It was therefore underscored that empowerment and enabling of LICs was a key to integrating TK into the development process.

20. The Commission might wish to recommend to governments to include a number of measures into national strategies on harnessing TK for the development process. This can include the institutional consolidation of indigenous organizations; facilitation of building of partnerships between LICs and authorities, researchers and experts; promotion of the intercultural exchange of experience; building of traditional knowledge networks; integrating TK in development programs/plans, including the provision of sufficient funding support; and facilitating dialogue with development partners. "The key role of development partners is to empower communities to use global and local knowledge", supported by capacity building. In addition, there is a need to explore how modern communication technologies can be used by LICs to share information.

21. In commercializing TK-based products, experts cautioned against over-exploiting the resource base of LICs. The Commission might wish to suggest that governments should bear this in mind when considering or taking measures to harness TK for development and trade.

22. Experts highlighted that governments can assist, both at national and international level, the commercialization of TK by interested LICs. Since LICs tend to be relatively small, they usually cannot on their own generate the economies of scale that are in particular necessary for entering the international market. Thus the facilitation of partnerships, for instance through the use of modern IT instruments, is very important. Standardization and quality control for TK-derived products and services were also considered important, in particular for traditional medicine and herbal products. Governments could also assist in creating new markets and market niches for TK-based products, for instance for vegetable dyes. Experts also saw merit in supporting the application of modern designs to traditional materials and crafts in promoting their trade.

Capacity building

23. Experts recommended that training and consultative programmes among LICs be carried out at the national level. These could include the following areas:

- awareness-raising on the importance of TK for national and global development;
- raising awareness among TK-holders, including the creators of traditional folk culture, of their rights in the area of intellectual property;
- strengthening and application of customary law;
- exploring ways to implement and enforce national legislation for the protection of TK as well as ABS legislation once it has been enacted;
- training in sustainable harvesting techniques;
- negotiating access and benefit sharing contracts;
- institutional consolidation of LICs;
- promoting the creation of networks of traditional practitioners and community-to-community exchanges to better disseminate good practices based on TK;

- facilitating policy dialogue between LICs and policy makers;
- documentation of traditional knowledge;
- converting TK into economically viable products and services.

24. The Commission might wish to make recommendations on which types of training are of highest priority and who should carry them out, e.g. governments, international organizations, NGOs, universities, etc. It may also wish to emphasize that women in LICs be target beneficiaries of such training. It may also wish to make recommendations on topics where capacity-building would best take place at the regional or international level, in addition to local and national. The capacity-building programmes should differentiate the objectives of each region and build a regional dialogue which can be self sustaining.

III. Possible policy action at the international level

25. Experts were of the view that national *sui generis* systems alone will not be sufficient to protect TK adequately. Exclusion from patentability of TK-based products in one country, for instance, would not prevent others from granting patents. The experts therefore recommended the exploration of "minimum standards of an international *sui generis* system for TK protection", with the full involvement of LICs (paragraph 40 of the outcome). In a communication received from a Member State following the Meeting it was argued that such a mechanism should also take into account IPR systems used by companies to protect further developments of TK.

26. The Commission might consider calling for the exploration and development of an international framework for *sui generis* protection of TK.

27. Views varied on the best forum for such a system/framework. The WTO TRIPS Agreement is silent on the protection of TK. Several experts argued that TK should be included in the TRIPS Agreement so as to prevent its misappropriation internationally. Reference was also made to proposals in this regard (African Group, several countries in Latin America and India) that had been submitted in preparation of the Seattle Ministerial Conference. Experts recommended that "[I]n addition to other fora, TK should also be discussed in the WTO" (paragraph 37 of the Outcome of the Meeting).

28. In the meeting's discussions it emerged that approaches to the protection and use of TK in several respects seem to be different in Latin America, Asia and Africa. This could call for a greater focus on regional capacity-building activities and policy dialogues. Policy-makers might wish to hold regional consultations on a regular basis to discuss these issues and find common solutions.

29. Since the protection of TK is such a multi-faceted issue, many institutions are working on it. Experts suggested that "an impartial working group could be created to coordinate these efforts." In addition, indigenous groups at the meeting called for the establishment of an Indigenous Peoples Working Group for Protecting TK or LICs, with funding from the international community. The Commission may wish to consider the merit of establishing these groups and, if appropriate, make recommendations on modalities.

IV. Recommendations to UNCTAD

30. Experts made several recommendations for further work by UNCTAD (paragraph 41). The most relevant are:

(a) Regional approach to further work on the protection of TK

31. Experts recommended that in its further work on the protection of TK UNCTAD should pay attention to regional aspects, for example by organizing workshops and seminars at the regional level. Besides intra-regional exchange of national experience on TK protection and development, one could also explore the possibility of building regional systems of protection, regional trademarks and other such schemes. Taking into account the recommendations by the experts, the Commission may wish to recommend specific capacity-building activities to be designed and implemented in cooperation with the CBD, WIPO, the World Bank and other relevant institutions, building on the existing programmes mentioned under (c) below.

(b) Sui generis systems and multilateral aspects thereof

32. Experts recommended that UNCTAD "assist interested developing countries in exploring *sui generis* systems for the protection of TK, including possible multilateral aspects of such systems". The Commission's deliberations may provide an opportunity for interested developing countries to comment on their specific capacity-building needs in this area.

(c) Strengthening capacity-building programmes on TK

33. Experts recommended that UNCTAD strengthen capacity-building programmes on TK, including within the framework of the BIOTRADE Initiative, the UNEP-UNCTAD Capacity Building Task Force (CBTF) on Trade, Environment and Development and ongoing (India, Viet Nam) and planned UNDP/UNCTAD projects. It was also recommended to further develop the TrainforTrade 2000 module on Traditional Knowledge, Trade and Development.

34. At the Expert Meeting and in subsequent events, the secretariat has received several expressions of interest in joint capacity-building activities. For example, the outcome of the Expert Meeting was discussed at the Meeting of African Trade Negotiators on selected WTO issues, held in Mauritius, 4-8 December 2000, and recommendations were made for regional capacity-building activities, in co-operation between the Organization for African Unity and UNCTAD. Similarly, the WHO Inter-regional Workshop on Intellectual Property Rights in the Context of Traditional Medicine, held in Bangkok on 6-8 December 2000, recommended that "WHO in cooperation with other agencies, including UNCTAD, needs to support the initiatives taken by respective governments of Member States for capacity building, implementation and enforcing the legislation to protect and promote traditional medicine knowledge through training, seminars and workshops. International cooperation should be increased in this area". The Commission may wish to explore further avenues of cooperation, including within existing programmes.

(d) Contributing to ongoing processes in CBD, UNCCD, WHO, WIPO and WTO

35. In their interventions and information notes, WIPO and CBD emphasized the contribution UNCTAD could make to the work of the recently created WIPO Intergovernmental Committee on

Intellectual Property Rights, Genetic Resources and Traditional Knowledge as well as the CBD Working Group on the Implementation of Article 8(j) and Related Provisions. UNCCD proposed close cooperation with UNCTAD, if appropriate through a Memorandum of Understanding. The Commission may wish to give recommendations concerning UNCTAD's contribution to ongoing work in CBD, UNCCD, WHO, WIPO, WTO and other organizations.

(e) Harnessing TK for Development and Trade

36. The Experts emphasized that TK is often an underutilized resource in the development process and that there is a need for awareness-raising and for "the design and implementation of comprehensive national strategies to harness TK for development and trade". The Commission may wish to recommend that these issues be taken into account *inter alia* in the context of the LDC-III Conference.

37. UNCTAD could also explore the possibility of developing trademarks and other forms of labeling which could facilitate the creation of niche markets for such products.

(f) Publication

38. The Experts recommended publishing, including on the Internet, the papers submitted to the Expert Meeting. The Commission may wish to endorse this recommendation and take decisions on its implementation.

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Analysis of market access issues facing developing countries: Impact of anti-dumping and countervailing actions

Note by the UNCTAD secretariat

GE. *200105014 6* LS

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I. Background

1. The Expert Meeting on the Impact of Anti-Dumping and Countervailing Actions was held at the Palais des Nations, Geneva, from 4 to 6 December 2000. The decision to convene this Meeting was taken in accordance with paragraph 132 of the UNCTAD X Plan of Action (TD/386), which states that "UNCTAD's work should relate first to analysis and, where appropriate, on the basis of the analysis, contribute to consensus-building on: impact of anti-dumping and countervailing duties actions". This decision was confirmed by the Trade and Development Board at its twenty-fourth executive session on 12 May 2000.

2. On the basis of concrete experiences presented by national experts, presentations by resource persons and the background note prepared by the secretariat (TD/B/COM.1/EM.14/2), discussions focused on: (i) the review of the current trends in the application of anti-dumping and countervailing measures; (ii) the examination of the impact of application of anti-dumping and countervailing measures on member States, particularly, developing countries; (iii) the operation and implementation of the WTO rules on anti-dumping and countervailing measures; and (iv) the identification of the main issues and areas of concern that need to be addressed. Experts identified nearly 30 specific issues with respect to dumping, injury and procedure, and areas of concern to developing countries. It was suggested that these issues and areas of concern be addressed, as appropriate, in (i) future multilateral trade negotiations; (ii) the current activities of the WTO Committee on Anti-Dumping Practices and its organs; (iii) the WTO dispute settlement mechanism; (iv) national policies of member States; and (v) the future work of UNCTAD and other relevant international organizations in this area, including technical assistance activities. The discussions focused on the application of anti-dumping and countervailing measures, and did not touch on more theoretical economic themes, such as the economic logic of anti-dumping systems, which has been the subject of considerable debate among economists.

3. The Meeting presented a unique opportunity for public and private actors, and trade negotiators and practitioners from both developed and developing countries, as well as WTO members and non-members alike, to express their views and concerns in an international forum, which would facilitate (or contribute to) consensus-building on the impact of anti-dumping and countervailing actions.

II. Areas for further action: recommendations based on the experts' discussions

4. The experts focused on the following elements of anti-dumping problems: determination of dumping, determination of injury, procedures and the special concerns of developing countries.

Dumping

5. With respect to dumping, experts identified a series of practices which they considered led to more frequent findings of dumping and higher dumping margins, and suggested that these problems could be mitigated through certain clarifications of specific provisions of the AAD (i.e. the Agreement on Anti-Dumping, or officially the Agreement on the Implementation of Article VI of GATT 1994). Provisions referred to included the 5 per cent test rule, exclusion of sales below cost, calculation of credit costs, constructed normal

value, duty drawback, level of trade, exchange rate fluctuations, zeroing, exchange gains or offsets, and higher *de minimis* thresholds.

6. It was noted that certain industries, described as "cyclical", were characterized by recurring periods of overproduction, and that the current treatment of sales below cost could lead to the massive imposition of anti-dumping measures. It was suggested that a solution be sought to deal with this problem.

7. There was considerable discussion of the issue of non-market economies. Some experts considered that non-market economy regulations were being applied against their countries, although they did not meet the criteria set out in Article VI of GATT 1994, and that in future the surrogate country approach should be applied only against countries which met those criteria, such as a total government monopoly of trade and all prices being set by the State. Other experts noted that in some countries serious problems existed in determining normal value (due to lack of generally accepted accounting principles, State-owned corporations, inputs provided by the Government, etc.) which required that the surrogate country approach be followed. Some experts considered that if non-market-economy criteria were to be applied against their exports, regardless of any conflict with the GATT rules, this should be done in a fair manner which did not lead to excessive margins of dumping.

Injury

8. Experts also addressed practices relating to the determination of injury, which in their view also required clarification. It was considered that action to raise the thresholds for negligibility, to base thresholds on market share rather than on share of total imports, and to exclude "negligible" imports from cumulation in injury findings would reduce the number of actions against small suppliers, notably developing countries. Respect for the lesser duty rule, i.e. applying anti-dumping duties no higher than those needed to prevent injury, would also reduce the trade impact of anti-dumping measures.

9. In addition, experts addressed issues of standing and urged that practices which led to reduced scope for the domestic industry (for example, by excluding "captive production") and thus a greater probability of determining injury should be used only when clearly justified.

Procedures

10. Experts expressed many concerns with regard to procedures followed in anti-dumping cases. They found that excessively complicated and lengthy questionnaires, often in languages in which their enterprises were not fluent, led to their not providing the necessary information within the required time limits. The questionnaires should be simplified, and the difficulties in translation taken into account.

11. There were also problems with the imposition of anti-dumping duties, in that some remained in force for an extended period of time despite the "sunset" clause, while in other cases investigations were initiated immediately after the termination of a previous investigation on the same product. In yet other cases, price undertakings were not accepted, although this would have permitted a less trade restrictive solution.

Special concerns of developing countries

12. Experts focused on the special concerns of the developing countries, noting the devastating effect that anti-dumping actions could have on their economies and societies, and particularly on their attempts at export diversification. It was observed that Article 15 of the AAD, which obliged countries to explore the possibilities of constructive remedies before applying anti-dumping duties against the exports of developing countries, remained a "best endeavour" undertaking. A number of the solutions proposed above, such as higher thresholds for *de minimis* dumping, "negligible" imports and *ad valorem* subsidies, could result in developing countries having to face a reduced number of anti-dumping actions. This was particularly important because of the difficulties they encountered in defending the interests of their exporters in anti-dumping cases, due to their lack of financial resources and familiarity with the specific technicalities of anti-dumping cases. It was suggested that studies could be carried out by UNCTAD to identify the positive trade impact of raising thresholds to higher levels.

13. Many experts, particularly from African countries, argued that their domestic markets were flooded with dumped imports which were having a disastrous impact on their domestic producers, but they found that they did not have the financial, technical and human resources to conduct investigations. While some experts from developed countries indicated that their countries could provide resources to support efforts to strengthen the administrations of those countries, the question arises as to whether this would constitute the optimum use of scarce financial and human resources. Efforts could be made by UNCTAD to assess the scope of the problem and attempt to devise a more constructive solution for these countries.

Future action

14. Many experts considered that a lack of clarity in the rules and disciplines remains. In this context, they indicated other problems which were not a result of neglect of the obligations contained in the AAD, but of importing countries' legislation permitting domestic complainants to make full use of the flexibility provided in the AAD. Some experts urged the authorities of importing countries to seek to avoid the problems which had been identified in their application of anti-dumping and countervailing duties. More clarity could be given to the disciplines in the context of the work done in the WTO Committee on Anti-Dumping Practices, in particular its Ad Hoc Group on Implementation, which should produce rapid and meaningful results in the form of formal recommendations on the implementation of the AAD. Other improvements might be achieved in the current work on implementation in the WTO General Council, or await a new round of multilateral trade negotiations. Some experts considered that a tightening of the disciplines was an urgent matter in order to prevent a situation in which the elimination of the Multi-Fibre Arrangement (MFA) quotas under the WTO Agreement on Textiles and Clothing would be followed by a wave of anti-dumping actions against countries' exports of textiles and clothing.

15. Experts noted that there had been an increase in recourse to the WTO dispute settlement mechanism with respect to anti-dumping measures, and welcomed the efforts made in establishing greater precision and predictability in the rules with a view to facilitating international trade.

III. Policy comments by UNCTAD member States

16. Pursuant to the Trade and Development Board's decision taken at its twenty-fourth executive session, the outcome of this Expert Meeting was circulated by the secretariat to member States in December 2000 with a request for policy comments on the experts' recommendations.

17. Mauritius has requested that under the heading "Small Economies", the scope of paragraph 38 of the document (TD/B/COM.1/EM.14/L.1) be expanded by including a specific reference to the need to provide assistance in the elaboration of legislation and the setting up of the Investigation Authority. Furthermore, a suggestion was made in the context of the discussions that Article 15 of the AAD should contain a new paragraph that exempts small economies from anti-dumping investigation. Mauritius wished this to be reflected in paragraph 40 of the outcome document.

18. Pakistan requested that the following points made by its expert on the first day of the meeting be included in the outcome document.

- Repeated/back-to-back anti-dumping investigations in some jurisdictions on the same product originating from the same countries are important issues, particularly from a developing country point of view, and therefore need to be suitably addressed.

- The lesser duty rule as envisaged in Article 9.1 of the AAD, which is currently not mandatory, must be made so. The AAD speaks of a causal link between dumping and injury to the industry. Anti-dumping action depends primarily on the establishment of such a link. If no injury is found, anti-dumping action cannot be taken even if there is dumping. Secondly, anti-dumping action is corrective in nature (i.e. duty is applied to the extent necessary to remove the injury) rather than punitive. It is therefore imperative that lesser duty be applied as a rule through mandatory provisions.

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Note by the UNCTAD secretariat

Addendum

Malaysia requested on 29 January 2001 that its policy comments as contained in the annexed table be taken into consideration in the preparation of the documents for the fifth session of the Commission on Trade in Goods and Services, and Commodities. It also requested that since the anti-dumping investigating authorities in Malaysia lack experience in certain areas, the views expressed herein on some provisions are to be regarded as "evolving".

GE.01-50445

POLICY COMMENTS ON THE OUTCOME OF THE EXPERT MEETING ON THE IMPACT OF ANTI-DUMPING AND COUNTERVAILING MEASURES
COUNTRY: MALAYSIA

No.	Views Expressed	Policy Comments
	1. DUMPING	
1	5 % viability test 5. The 5 % test should be applied on a global basis for the like product. The investigating authorities should conduct a further review to determine whether the low domestic sales volume compared to the export volume was caused by the small size of the domestic market of the exporting country and might, therefore, serve as the basis of normal value. The per capita consumption of the product concerned should be taken into account.	If the sales volume is small due to small size of domestic market, the producer/exporter needs to submit the evidence to substantiate the claim for consideration, as the Investigating Authourity (IA) may not have access to such information.
2	Paragraph 6, Page 2: Exclusion of sales below cost 6. It has been suggested that the current 20 % threshold may not adequately reflect business realities. Practice by investigating authorities also seems to suggest that where sales below cost represent more than 20% of total domestic sales, such sales are systematically excluded and normal value is based on remaining sales above cost artificially and arbitrarily increasing normal values and dumping margins. To tackle this problem, the current 20% cut-off could be raised, and authorities must respect the "reasonable period of time" as required by the Anti-Dumping Agreement. 7. It was suggested that the weighted average normal value may not be less than the weighted average cost per unit.	Need further investigative/empirical study.
3	Constructed Normal Value 8. Experience seems to suggest that manipulation of exporters financial information may result in distortion of the dumping margins of exporters under certain circumstances. Article 2.2.2 allows too much discretion and may lead to unreasonable selling, general and administrative expenses and profit calculations in certain cases. Therefore, the current provision should be clarified	Agreeable.
4	Fair and symmetrical comparison: 9. It was generally felt that in order to achieve a fair comparison, common rules must be established to obtain equal results based on the same set of data.	Agreeable to further clarifying common rules.

5	Credit cost 10. Actual credit costs should be accepted in normal value calculations even if not based on contractual arrangements.	Agreeable provided evidence of actual credit cost incurred is shown.
6	Duty drawback 11. High standards of burden of proof are in some jurisdictions used to reject or minimize normal value adjustments based on valid duty drawback claims. Article 2.4 of the AAD should be clarified to ensure that drawback adjustments are based on prevailing business practices and realities.	Agreeable to establishing reasonable standard of proof expected of exporters based on prevailing duty drawback system of the country.
7	Level of trade 12. Some countries define the difference of level of trade in a complicated manner thereby imposing an unreasonable burden of proof on exporters. Also, countries do not provide proper information regarding the definition of level of trade. Rules on identification and quantification of level of trade adjustments are needed.	Agreeable.
8	Exchange rate fluctuations 13. The absence of a definition of: "sustained movement" in Article 2.4.1 is a matter of concern for countries with floating exchange rates. Short-term fluctuations and long-term trends in exchange rates should be clearly distinguished and that the long-term trends should be defined as "sustained movement", which would normally exceed 60 days for adjustment of export prices.	Agreeable to further discussion.
9	Exchange gains or offsets 14. While exchange losses are usually taken into account, exchange gains are frequently ignored on narrow, technical grounds thereby inflating costs and minimizing favourable adjustments. Article 2.2.1.1 should be clarified so as to exclude consideration of both exchange gains and losses, or to ensure that exchange gains are included in the calculation of costs of production.	Agreeable to further discussion.
10	Zeroing (exceptions) 15. The three exceptions contained in Article 2.4.2 (purchasers, regions, time) are too broad and disproportionately benefit large economies. The exceptions must be tightened. Zeroing should not be applied in both investigations and reviews.	Agreeable.

11	Non-market-economy treatment 16. Non-market-economy provisions should only be applied against countries which meet the criteria of GATT Article VI, that is a non-market economy is one which has a "complete or substantially complete monopoly of its trade and all domestic prices are fixed by the state". Very few countries at present meet these criteria. 17. In cases where investigating authorities encounter difficulties in establishing normal value, for example for exports from countries in transition, they should ensure that the methodologies used are in fair and predictable.	Agreeable.
12	*De minimis* dumping 18. The practical impact of an increased de minimis dumping margin should be empirically researched. It was suggested that UNCTAD could undertake a study on this issue.	Agreeable.
13	Cyclical industries 19. Given the fact that some industries are cyclical, the current treatment of sales below costs of production as set out in the AAD can result in the finding of dumping during periods of low capacity utilization. Solutions should be sought to avoid massive imposition of measures during such periods.	Need further investigative/empirical study.
	2. INJURY	
14	Basis of Negligibility 20. It has been suggested that thresholds for excluding negligible imports from injury determinations should be based on share of the importing country market, not of imports.	Agreeable. **Need to also stipulate a standard/fixed time frame in considering the total imports**.
15	Negligible Import Volumes 21. The level of negligible imports should be increased to a level higher than the current 3 % based on empirical research demonstrating a positive trade impact.	Agreeable. Need to carry out empirical study.
16	Cumulation 22. Cumulation of suppliers that individually meet the negligible criteria using the 7 per cent rule, should be revised or eliminated.	Agreeable to reviewing.
17	Captive production/definition of "industry" 23. Exclusion of captive production from injury analysis should not occur without proper justification.	Need further study for consistency in considering captive production as against definition of domestic industry.

18	Lesser duty rules 24. It was suggested that the lesser duty rule should be made mandatory and its application made subject to regular review. It was observed that some authorities had encountered difficulties in calculating the lesser duty.	Needs further study to establish standard methodologies in calculating the lesser duty rule.
19	**3. PROCEDURE** Back-to-back complaints 25. The repeated recourse to AD actions against same product has been identified as one of the problems relating to the implementation of the AAD. The disciplines in this regard should be strengthened to preclude the initiation of any investigation for a period of 365 days from the date of termination of a previous investigation on the same product from the same country. 26. Petitions brought before the investigating authorities within the 365 days should be examined with the utmost care.	Further study needed to establish what would be an appropriate period.
20	Standing 27. When challenging standing, the burden of proof should not be on the exporters, rather the national investigating authorities of the importing country should demonstrate that they have correctly determined standing in accordance with Article 5.4 of the AAD.	Agreeable.
21	Sunset reviews 28. Anti-dumping and countervailing duty actions should not normally continue after five years. An anti-dumping duty should remain to force only as long as and to the extent necessary to counteract dumping which is causing injury. The investigating authorities have been conducting sunset reviews in conformity with the spirit and legal requirements of the WTO Agreements.	Agreeable. Need to establish guidelines and standard criteria for sunset reviews.
22	Questionnaires 29. Replying to questionnaires, some of which extend to hundreds of pages, constitutes a major burden, particularly for small and medium-sized exporters from developing countries. The questionnaires should be as simple as possible, focusing only on the necessary information. Consideration should be given to a standard questionnaire.	Agreeable.

23	Language 30. Difficulties and cost in translating documents required as evidence in investigations should be taken into account by investigating authorities with a view to minimizing the burden on respondents. Translation difficulties should be given special consideration as a justification for extension beyond the normal 30 days for responding to questionnaires	Agreeable to the extension of time but is of the view that this does not resolve other related problems. A country with no resource to translate a particular language is unable to evaluate the basis of the initiation and subsequent findings of the IA to appropriately respond or establish whether the provisions of the WTO AD Agreements have been fully complied with in conducting the investigation. Further, inaccurate translations may give negative legal implications in disputes. Therefore propose translations to be done by the IA in any one of the 3 WTO languages.
24	Independent bodies 31. It was suggested that national AD/CVD administering or investigating authorities should function autonomously with respect to technical decisions.	
25	Price undertaking 32. In order to enable exporters to continue to access to the market, price undertakings should be accepted, if offered by the exporters under terms that would remedy dumping or its injurious effects, as an alternative to anti-dumping duties.	The current flexibility provided by the WTO AD Agreement to be maintained.
26	**4. SPECIAL CONCERNS OF DEVELOPING COUNTRIES** 33. Anti-dumping actions, including the initiation of investigations that are subsequently determined to be unfounded, may often have a devastating effect on the economies and societies of developing countries as they cut off trade to crucial export markets. They often frustrate their efforts to diversify their exports into new sectors of production. Anti-dumping actions may result in a diversion of investment away from developing countries to the major market countries. Anti-circumvention measures could result in countries which have made no contribution to material injury in the importing country being caught up in anti-dumping actions. Developing countries are particularly concerned that upon the expiry of the ATC, there could be a wave of anti-dumping actions against textiles and clothing exports. 34. There is a need to make the best endeavour provisions of Article 15 of the Anti-Dumping Agreement operational. This could be accomplished *inter alia* by increasing the de minimis	Agreeable.

	thresholds for dumping and injury to levels which would provide meaningful trade advantages for developing countries and eliminating cumulation of their exports. Increases of these thresholds to 5% were suggested, but further empirical analysis should be undertaken to ensure that these levels were high enough to accord meaningful trade advantages to developing countries. Higher thresholds would also reduce the cost of defense against anti-dumping actions by developing countries as they would be automatically excluded in a greater number of cases. **The possibility of recommending progressive duties in the case of developing countries should be explored to help the producers in these countries in realigning their production**.	Need further study on the practical aspects of implementation.
27	Cost of defence 35. Developing country exporters face serious difficulties in defending their interests against anti-dumping actions. They usually do not possess the necessary technical expertise, and lack the resources required for legal counsel in anti-dumping actions or in pursuing their rights under the WTO dispute settlement mechanism. These exporters require training in order to understand dumping issues so as to minimize the risk of anti-dumping actions against them	Agreeable.
28	Difficulties in application 36. Developing countries, which are the subject of dumping, face difficulties in applying anti-dumping actions. They lack the financial, technical and human resources to conduct investigations. As a result, many find themselves unable to defend their producers against dumped imports. They require technical and financial assistance to strengthen their administrations. 37. Dumped imports are a particular problem for African countries which perceive that they are the targets of increased dumping from outside the region; they require assistance in addressing this problem. A solution should be sought for African countries.	Agreeable.
29	Small economies 38. Technical assistance should take into consideration the specificities of small developing economies, such as an accentuated lack of financial, technical and human resources, and should provide for a practical approach to institution building that could economize on investigation, administrative and other costs. 39. Given the size of the market and the strength of the local industries, the time taken by local industries to lodge a complaint and for an AD investigation to be initiated, may result in the death of the industry.	

	40. Small economies have few products for export and any AD actions against these products will destabilize the economy.	
30	Countervailing duties 41. In assessing duty drawback systems in developing countries, aggregate evidence should be accepted when exporters are unable to identify individual inputs. Developing countries request that they should be entitled to estimate the incidence of excise, sales and other internal taxes for refund without this being considered an export subsidy. The *de minimis* subsidy level for countervailing duty investigations should be increased from 1 per cent to 2.5 per cent for developing country exports.	Agreeable. Need further investigative/empirical study on the increase of *de minimis* subsidy level for developing countries.

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Note by the UNCTAD secretariat

Addendum

The United States of America requested on 29 January 2001 that the annexed comments be circulated at the fifth session of the Commission on Trade in Goods and Services, and Commodities.

GE. *0010504 52* LS

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Annex

Comments by the United States of America on the Draft Report of the UNCTAD Experts Meeting on the Impact of Anti-Dumping and Countervailing Duty Actions

January 29, 2001

The United States appreciates this opportunity to offer additional comments regarding the UNCTAD Expert Meeting on the Impact of the Anti-Dumping and Countervailing Duty Actions, held on 4-6 December 2000. General comments on the draft "Outcome Report" of that meeting were provided, in a letter from U.S. Ambassadors Rita D. Hayes and George E. Moose, to Secretary-General Ricupero, dated December 22, 2000. Those comments expressed disappointment in the failure of the draft report to reflect the diversity and balance of the comments made at the meeting on a wide variety of issues, and concern about the almost exclusive focus of the draft report on the perceptions of some participants that the existing antidumping and countervailing duty rules and practices are deficient and/or improper.

The United States continues to believe that the draft report is seriously unbalanced and poorly reflects the diversity of views expressed at the meeting. However, we have concluded that it would not be appropriate to submit detailed, paragraph-by-paragraph comments.

We do, however, have some additional general comments to provide on the issues raised in the draft report. The following paragraphs of the draft report suggest specific changes, or the need for changes, in the substantive or procedural rules governing antidumping and countervailing duty proceedings: paragraphs 5 (five per cent viability test), 6 (exclusion of sales below cost), 7 (floor on normal value), 9 (fair and symmetrical comparisons), 10 (credit cost), 11 (duty drawback), 13 (exchange rate fluctuations), 14 (exchange gains or offsets); 15 (zeroing (exceptions)), 20 (basis of negligibility), 21 (negligible import volumes), 22 (cumulation), 24 (lesser duty rule), 25 (back-to-back complaints), 27 (standing), 32 (price undertakings), 34 (specifying rule changes applicable to developing country exports), and 41 (countervailing duties).

The draft report lists the suggestions made by some participants in relation to the above topics, as if they were consensus-based recommendations. This was not the case. The suggestions noted in the draft report certainly do not reflect the views expressed by a number of other participants, representing both developing and developed countries, including the United States.

The following paragraphs of the draft report raise issues or perceived problems mentioned by some participants, without suggesting specific changes to the existing rules: paragraphs 4 (WTO dispute settlement), 8 (constructed normal value), 12 (level of trade), 16 (non-market-economy treatment); 18 (*de minimis* dumping); 19 (cyclical industries), 23 (captive production/definition of industry), 29 (questionnaires), 30 (language), and 31 (independent bodies). To the extent that there may be questions about how the existing rules

are and should be applied, there already exist fora that are specifically charged and technically equipped to take up such matters, *i.e.*, the WTO Committee on Anti-dumping Practices and its Ad Hoc Group on Implementation. The United States participates actively in both of these bodies and firmly believes that they provide the appropriate setting for substantive discussion of such issues.

Paragraphs 33 to 40 of the draft report deal with developing countries and small economies. These paragraphs discuss, on the one hand, problems encountered by exporters in developing countries or small economies when they are subject to antidumping investigations and, on the other hand, problems which developing country/small economy industries and governments may face in wishing or attempting to act against dumped imports. The United States appreciates the difficulties experienced by developing countries in implementing their own antidumping laws, as we attach considerable importance both to the right to employ such remedies and the obligation to do so in a manner consistent with the WTO's rules. Along with the WTO Secretariat and other WTO Members, we have provided guidance and assistance to a variety of countries for this purpose in the past, and we stand ready to do so in the future. In addition, the United States has provided assistance to small producers in developing countries in the context of individual antidumping and countervailing duty cases, such as by sending teams to explain questionnaires or in helping to identify less burdensome ways for parties to supply needed information.